

January 29, 2019

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, DC 20202

Re: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

On behalf of the American Speech-Language-Hearing Association, I write to offer comments on the *Federal Register* notice of proposed rulemaking that would amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The proposed regulations are intended to clarify and modify Title IX regulatory requirements pertaining to: the availability of remedies for violations; the effect of Constitutional protections; the designation of a coordinator to address sex discrimination issues; the dissemination of a nondiscrimination policy; the adoption of grievance procedures; and the process to claim a religious exemption.

The American Speech-Language-Hearing Association (ASHA) is the national professional, scientific, and credentialing association for 198,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students.

ASHA's vision is, "making effective communication, a human right, accessible for all." Therefore, ASHA is committed to ensuring that individuals have full and unfettered access to all **appropriate** services and supports in higher education settings to allow them to communicate as effectively as possible. This commitment includes strong support for higher education environments that are free from any harassment or discrimination on the basis of age, disability, ethnicity, gender identity, national origin, race, religion, sex, sexual orientation, and veteran status.

ASHA provides the following comments and recommendations on the proposed regulations.

§ 106.12 Educational institutions controlled by religious organizations.

Comments

ASHA supports strengthening the requirement in current regulations for educational institutions to submit a letter to the Assistant Secretary requesting assurance of its religious exemption, and stating which parts of the regulation conflict with a specific tenet of the religion. The current process for obtaining assurance is minimally burdensome, meets the needs of all the parties involved, and ensures that religion as a basis for the exemption mirrors what is legally permissible.

Recommendation

Amend § 106.12(b) by striking and adding bolded language as follows:

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section ~~may~~ **must** do so by submitting in writing to the Assistant Secretary a statement by the highest-ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization ...

Rationale

It is important to strengthen the current requirement that an educational institution must submit a letter to the Assistant Secretary requesting assurance of its religious exemption and stating which parts of the regulation conflict with a specific tenet of the religion. This required affirmation is necessary to promote transparency, clarify expectations, and minimize the burden on the institution to document its eligibility for an exemption with multiple parties.

Individuals who are not employed by an exempted educational institution (e.g., service providers, employers, potential students), but may engage with the institution, deserve a clear understanding of the exemption's implications on the institution's actions, rules, and policies. It must be clear to potential employees, students, and consumers of the institution's services that the exemption does not constitute a formalized way of allowing discrimination. Documented assurance from the U.S. Department of Education provides guidance and protection to educational institutions for applying their waiver consistently and documenting their exemption for other entities as proof that the institution is not violating the law.

§ 106.30 Definitions.

Definition of “Actual Knowledge”

Recommendation

Expand the definition of “actual knowledge” to include the range of possibilities of how “actual knowledge” is conveyed and notice given to ensure access for individuals with disabilities.

Rationale

The proposed regulations define “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.” Notification may be provided not only via written form, but also via the use of an augmentative and alternative communication (AAC) system, sign language system, communication partner, or other method. Individuals with communication disorders may rely upon several different communication methods while conveying “actual knowledge” and providing “notice” to the educational institution. ASHA recommends that varying communication methods be appropriately reflected in the definition of “actual knowledge.”

Definition of “Formal Complaint”

Recommendation

Amend the definition of “formal complaint” by adding bolded language as follows:

Formal complaint means a document signed (**or affirmed via another effective communication modality**) by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent...

Rationale

As proposed, the complaint submission process does not allow some individuals with disabilities—particularly those with communication disorders/disabilities—to submit claims. ASHA recommends that the proposal be expanded to accommodate the needs of individuals with disabilities by accepting different communication modalities including oral, manual, AAC techniques, and assistive technologies.

Definition of Sexual Harassment

Recommendation

Amend the definition of “sexual harassment” by striking and adding bolded language as follows:

Sexual harassment means:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
2. Unwelcome **sexual** conduct ~~on the basis of sex~~ that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or ...

Rationale

All individuals should be protected from unwelcome conduct be it sexual or otherwise. Adding “sexual” and omitting the clause “on the basis of sex” maintains the original focus and practical impact of the legislation to protect all individuals across the gender spectrum from harassment regardless of their sex or gender identity. This amendment allows for clarity that all Americans are protected from sexual harassment.

§ 106.44 and § 106.45

Recommendation

There are numerous references in the proposed regulations to “written notice,” inform complainant in “writing,” requiring a “written response,” “written documentation,” “written consent,” etc., which requires expansion in order to include other modalities that allow access for individuals with disabilities. Below are a few illustrative examples that should be amended by the bolded language below. These changes should be made throughout the document where these terms are used. ASHA recommends the Department does a search and replace throughout the notice to capture the 67 references to “written” in the notice (of which the actual regulatory language has 17) and 11 references to “writing” throughout the notice (of which 4 are in the regulatory language).

§ 106.44 Recipient’s response to sexual harassment.

§ 106.44 (b)(3)

...At the time supportive measures are offered, the recipient must in writing **(or affirmed via another effective communication modality)** inform the complainant, of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

§ 106.45(b)(2) Notice of Allegations.

—(i) *Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a recipient must provide written notice (**or notice affirmed via another effective communication modality**) to the parties of the recipient’s grievance procedures and of the allegations.”

§ 106.45 Grievance procedures.

(b)(3)(v) Provide to the party whose participation is invited or expected written notice (**or notice affirmed via another effective communication modality**) of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

§ 106.45(b)(4) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written **notice (or notice affirmed via another effective communication modality)** determination regarding responsibility.

(iii) The recipient must provide the written determination (**or determination affirmed via another effective communication modality**) to the parties simultaneously.

(b) Appeals.

(v) Issue a written decision (**or decision affirmed via another effective communication modality**) describing the result of the appeal and the rationale for the result; and

(vi) Provide the written decision (**or decision affirmed via another effective communication modality**) simultaneously to both parties.

Rationale

The entire process outlined in the proposed regulations heavily relies on communication using a written communication modality even though proposed § 106.45(b)(1) acknowledges that, “the need for language assistance or accommodation of disabilities” may impact the timeframe for completion of the grievance process and that, “recipients must meet their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under Title II of the ADA, Section 504, and Title VI of the Civil Rights Act of 1964.” This process does not ensure access to complaint submission for some individuals with disabilities, particularly those with communication disorders/disabilities. Therefore, ASHA recommends that it be expanded to accommodate the needs of individuals with disabilities by accepting different communication modalities including oral, manual, AAC techniques, and assistive technologies.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(b) Grievance procedures.

Comments

The proposed regulations rely on communication via the written modality across the entire process, including during affirmation, notification, and response to a complaint. ASHA recommends that the U.S. Department of Education expand the communication vehicles used

in the proposed regulations, including the *Grievance procedures* section, to include acknowledgement and acceptance of varying forms and styles of effective communication such as oral, manual, AAC techniques, and assistive technologies, to be inclusive of those used by individuals with communication disorders. Individuals who rely on AAC technology may use unaided systems such as gestures, facial expressions, and/or sign language; or they may use aided systems including basic systems such as picture boards or high-tech aided systems such as speech-generating devices.

It is important to recognize other communication modalities so that individuals with communication disorders/disabilities have access to engage fully in the institution's processes, as required by federal law/regulation. The ADA requires that Title II entities (State and local governments) and Title III entities (businesses and nonprofit organizations that serve the public) communicate effectively with people who have communication disabilities. The goal is to ensure that communication with people with disabilities is as effective as communication with people without disabilities.

Directed Question 5. Individuals with disabilities.

Comments

Similar to the recommendation above regarding grievance procedures, the proposed regulations related to Directed Question 5 make specific references to communication via the written modality across the entire process, including during affirmation, notification, and response to a complaint, which does not provide access for some individuals with disabilities, particularly those with communication disorders/disabilities. Effective communication and the method by which this is achieved is influenced by many different factors, including the disabling condition. ASHA recommends expanding this to include acknowledgement, acceptance of, and making available varying forms and styles of communication throughout the process of Title IX protections in the regulations, to not exclude those with communication disorders from these important protections.

ASHA proposes that alternate means for affirming a formal complaint be recognized and accepted since the ability to provide a signature or other writings may not be a viable option for all. Affirmation may also be provided via use of an AAC technology, sign language, communication partner, or other method.

Thank you for the opportunity to provide comments and recommendations on these important proposed regulations. If you or your staff have questions, please contact Catherine D. Clarke, ASHA's director of education policy, at cclarke@asha.org.

Sincerely,



Shari B. Robertson, PhD, CCC-SLP
2019 ASHA President